



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

January 26, 1999

Memorandum

Audit Referral 99-01

To: Lawrence M. Noble
General Counsel

Through: James A. Pehrkon
Acting Staff Director

From: Robert J. Costa
Assistant Staff Director
Audit Division

Subject: Buchanan for President, Inc. - Matters Referred to the Office of General Counsel

On January 14, 1999 the Commission approved the Audit Report on Buchanan for President, Inc. Based on the Commission approved Materiality Thresholds, 3 findings from the report are being referred to your office:

1. Finding II.A.2., Use of Candidate's Funds in Excess of the Limitation;
2. Finding II.B., Apparent Prohibited Contribution Resulting from Extension of Credit By Commercial Vendor; and
3. Disclosure of Occupation/Name of Employer.

All workpapers and related documents are available for review in the Audit Division. Should you have any questions, please contact Wanda Thomas or Rick Halter at 694-1200.

Attachment as stated.

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II.A. USE OF THE CANDIDATE'S FUNDS IN EXCESS OF THE LIMITATION

Section 9035.2(a)(1) of Title 11 of the Code of Federal Regulations states, in part, that no candidate who has accepted matching funds shall knowingly make expenditures from his or her personal funds, or funds of his or her immediate family, in connection with his or her campaign for nomination for election to the office of President which exceed \$50,000, in the aggregate. This section shall not operate to prohibit any member of the candidate's immediate family from contributing his or her personal funds to the candidate, subject to the limitations of 11 CFR part 110.

Section 9035.2(a)(2) of Title 11 of the Code of Federal Regulations states that expenditures made using a credit card for which the candidate is jointly or solely liable will count against the limits of this section to the extent that the full amount due, including any finance charge, is not paid by the committee within 60 days after the closing date of the billing statement on which the charges first appear. For purposes of this section, the *closing date* shall be the date indicated on the billing statement which serves as the cutoff date for determining which charges are included on that billing statement.

On January 12, 1995, the candidate made a loan in the amount of \$40,000 to the Committee; on March 31, 1995 the Committee received a \$1,000 contribution from the candidate in the form of a check. In addition, the candidate and his spouse, Shelley Buchanan, used an American Express credit card¹ to pay for campaign related travel and subsistence. Credit charges totaling \$86,885 were paid directly to American Express Company by the Committee.

The Audit staff reviewed the credit card payments to American Express to determine compliance with the 60 day reimbursement requirement of 11 CFR §9035.2(a)(2). Of the total, charges totaling \$83,203, were not reimbursed within the time limits provided and this amount was applied to the limitation on use of personal funds by the candidate. The untimely payments were made from 67 to 342 days from the closing date of the billing statements. Based on initial calculations made during audit fieldwork, the largest amount by which the candidate exceeded the \$50,000 limitation was \$72,203 after applying a payment made on May 8, 1996.

There was no documentation available with which to review any American Express charges which may have been incurred after February 29, 1996. The Committee repaid the candidate \$38,000 on July 8, 1996 to liquidate the balance of the personal loan (\$40,000 less previous repayment of \$2,000 made on April 6, 1995) and reduced the amount exceeding the \$50,000 limitation to \$34,203.

The Audit staff's finding was discussed with the Committee at the conference held subsequent to the close of fieldwork and the Committee was provided with a detailed schedule.

¹ American Express account with separate cards available for the candidate and his spouse. The account is in the name of Patrick J. Buchanan.

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In the Exit Conference Memorandum (the Memorandum), the Audit staff recommended that the Committee provide evidence that the candidate did not exceed the limitation on use of personal funds in connection with his campaign. Also, the Committee was requested to provide credit card statements and charge slips for the candidate's American Express account or any other credit card account used for the period of March 1, 1996 to August 14, 1996.

In response to the Memorandum, the Committee provided a list of expenses that were submitted for reimbursement. These expenses were apparently (1) incurred by the candidate and his spouse using the candidate's American Express card, (2) incurred by the candidate or his spouse unrelated to the use of the candidate's American Express card, or (3) charged to a Visa credit card account². The list also included the candidate's loan and personal contribution to the Committee. These items were listed in chronological order by due date³ beginning with the \$40,000 loan. Amounts were added or subtracted, depending on the type of transaction, from a running contribution balance. The Committee acknowledged in its response that "the candidate may have exceeded the limitation." According to the list prepared by the Committee, the largest amount by which the candidate could have exceeded the limitation was \$57,672 on March 30, 1996.

The Committee's analysis is inaccurate because expenses and reimbursements not related to the candidate's limit were included and other expenses were duplicated. It should also be noted that the list provided by the Committee indicates that American Express charges were incurred subsequent to February 29, 1996. The Audit staff was not provided with the statements and charge slips for American Express charges incurred subsequent to February 29, 1996 or for any Visa credit card charges in order to verify the accuracy of the listed transactions and to determine if the expenses charged to the Visa credit card were applicable to the candidate⁴. If the transactions listed by the Committee, for which complete documentation has not been made available, all relate to the candidate's limitation - "worst case scenario" - the largest amount by which the limitation would have been exceeded is \$66,549.

² The account is in the name of Patrick and Shelley Buchanan.

³ The due date listed for loans and contributions was the date received; for an expense reimbursement, the date of the reimbursement check; for expenses paid by cash, 30 days after incurrence; and for expenses charged to a credit card, 60 days from the credit card statement date.

⁴ Because the Candidate was the sole holder on the American Express account, all charges, except charges unrelated to the campaign, made on this account are applicable to the candidate's limit. In the case of the jointly held Visa credit card, charges incurred by the candidate's spouse, solely related to her expenses would not be applicable to the candidate's limit. Conversely, charges incurred by the candidate using the Visa credit card for goods and services provided to the candidate irrespective of who signed the charge slip would be applicable.

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Notwithstanding the above, for purposes of this report and based on our revised analysis of complete documentation currently available⁵, the largest amount by which the candidate exceeded the \$50,000 expenditure limitation at 2 U.S.C. §9035(a) is \$50,374. Credit card charges included in documentation presented by the Committee in response to finding III.B. of this report, (Apparent Non-Qualified Campaign Expenses) may impact on this amount. If transactions pertaining to the American Express and Visa credit cards for which complete documentation is not now available are later found to be applicable to the candidate's \$50,000 limit, adjustments will be necessary. These adjustments would likely occur in the event that the Commission addresses this issue in another context.

II.B. APPARENT PROHIBITED CONTRIBUTION RESULTING FROM EXTENSION OF CREDIT BY COMMERCIAL VENDOR

Section 441b(a) of Title 2 of the United States Code states, in part, that it is unlawful for any corporation to make a contribution or expenditure in connection with any election to any political office, and that it is unlawful for any candidate, political committee or any other person knowingly to accept or receive any contribution prohibited by this section.

Section 100.7(a)(4) of Title 11 of the Code of Federal Regulations states, in part, that the extension of credit by any person is a contribution unless the credit is extended in the ordinary course of the person's business and the terms are substantially similar to extensions of credit to nonpolitical debtors that are of similar risk and size of obligation. If a creditor fails to make a commercially reasonable attempt to collect the debt, a contribution will result.

Section 116.3(c) of Title 11 of the Code of Federal Regulations states, in part, that in determining whether credit was extended in the ordinary course of business, the Commission will consider whether the commercial vendor followed its established procedures and its past practice in approving the extension of credit; received prompt payment in full if it previously extended credit to the same candidate or political committee; and the extension of credit conformed to the usual and normal practice in the commercial vendor's trade or business.

The Committee used Matching Funds, Inc. (MFI) to prepare and file all submissions for matching funds. Scott Mackenzie, Committee Treasurer, is a principal of MFI. As stated in the contract between the two parties, in return for its services MFI was to receive a fee equal to 10 percent of the "Match Rate"⁶ applied to the amount of matching funds received. Invoices were to be submitted on a monthly basis beginning

⁵ This includes documentation available to the Audit staff at the time the Memorandum was forwarded to the Committee and information listed in the Committee's response in conjunction with collateral evidence in the Audit staff's possession.

⁶ The "Match Rate" is equal to the matching funds received divided by the net individual contributions (individual contributions less refunds of individual contributions) for the particular submission.

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January 1, 1996 and continuing until the termination of the contract. Invoices were to be paid from the matching funds received or within thirty (30) days.

The Committee received and reported matching funds of \$10,983,475 as result of 19 original submissions and 6 resubmissions. Using a fee factor of 7.05%⁷, the Audit staff calculated MFI's fee for its services at \$774,846. As of the conclusion of fieldwork, MFI had billed the Committee \$597,336, including a software fee of \$5,500, for matching fund submissions 1 through 8, leaving an uninvoiced balance of \$183,009 [(\$774,846 + \$5,500) - \$597,336]. The Committee made payments totaling \$586,510 through June 25, 1997 and reported an outstanding debt to MFI of \$10,826 on its Second Quarter 1997 disclosure report.

Based on the above information, it appeared the Committee still owed MFI a total of \$193,835 (\$183,009 + \$10,826) for its services. At the conference held at the conclusion of fieldwork, the Committee was provided with the Audit staff's calculations. Subsequently, the Committee provided additional invoices from MFI reflecting amounts due for submissions 9 through 16; no documentation was provided for submissions 17 through 19 and resubmissions 1 through 6. Matching funds were certified payable for these submissions monthly from May, 1996 through March, 1997. The Committee reported an outstanding debt to MFI of \$183,009 (which included the previous outstanding debt of \$10,826) on its Year-End 1997 disclosure report. This lack of action on the part of MFI to invoice and seek payment appears to represent an apparent prohibited contribution resulting from an extension of credit not within the ordinary course of business.

In the Memorandum, the Audit staff recommended that the Committee file an Amended Schedule D-P, Debts and Obligations excluding Loans, to report the correct indebtedness to MFI of \$193,835 as of year-end 1997. Also, it was recommended that the Committee provide evidence, to include but not be limited to, statements and invoices detailing all billings and efforts to collect indebtedness, explanations to demonstrate that the extension of credit was in the ordinary course of business, examples of other customers or clients of similar size and risk for which similar services had been provided and similar billing arrangements had been used, information concerning billing policies for similar clients and work, and debt collection policies to demonstrate that the Committee did not receive an apparent prohibited contribution of \$183,009; or absent such evidence provide documentation which demonstrates that MFI billed the Committee in a timely manner for the full amount due for its services and made a reasonable attempt to collect the debt.

In response to the Memorandum, the Committee filed an Amended Schedule D-P, Debts and Obligation excluding Loans, to report the correct indebtedness to MFI of \$193,835 as September 30, 1997. In its response the Committee stated that it:

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Match rate of 70.55% (reported matching funds of \$10,983,475 / net contributions of \$15,569,128) times 10%.

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“strongly disagrees that the facts presented in the Exit Memorandum evidence the receipt of a corporate contribution by the Committee. Political committees have never been deemed to receive contributions because they do not pay every vendor or employee in full on time. If committees did not acquire debts and obligations other than loans in the course of their activities, most of which are with corporations, no schedule of debts and obligations would be needed. MFI also requests that we state its strong objection to the suggestion that its actions constituted a corporate contribution to the Committee.”

It is the opinion of the Audit staff the Committee’s response failed to demonstrate that MFI made commercially reasonable attempts to collect payment from the Committee. Furthermore, the response did not present evidence that MFI’s actions were in accordance with its own contractual terms. Therefore, pursuant to 11 CFR §100.7(a)(4), an apparent prohibited contribution in the amount of \$183,009 occurred.

II.C. DISCLOSURE OF OCCUPATION/NAME OF EMPLOYER

Section 434(b)(3)(A) of Title 2 of the United States Code requires a political committee to report the identification of each person (other than a political committee) who makes a contributions to the reporting committee during the reporting period, whose contribution or contributions have an aggregate amount or value in excess of \$200 within the calendar year.

Section 431(13)(A) of Title 2 of the United States Code defines the term “identification” to be, in the case of an individual, the name, the mailing address, and the occupation of such individual, as well as the name of his or her employer.

Section 432(h)(2)(i) of Title 2 of the United States Code states, in part, that when the treasurer of a political committee shows that best efforts have been used to obtain, maintain, and submit the information required by this Act, any report or any records of such committee shall be considered in compliance with this Act.

Section 104.7(b) of Title 11 of the Code of Federal Regulations states, in part, that the treasurer and the committee will be deemed to have exercised best efforts if all written solicitations for contributions include a clear request for the contributor’s full name, mailing address, occupation and name of employer, and include the following statement: “Federal law requires political committees to report the name, mailing address, occupation and name of employer for each individual whose contributions aggregate in excess of \$200 in a calendar year.”

For each contribution received aggregating in excess of \$200 per calendar year which lacks required contributor information, the treasurer must make at least one effort after the receipt of the contribution to obtain the missing information. Such effort shall consist of either a written request sent to the contributor or an oral request to the contributor documented in writing. The written or oral request must be made no later than thirty (30) days after receipt of the contribution. The written or oral request must clearly ask for the missing information and shall not include material on any other subject

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or any additional solicitation, except that it may include language solely thanking the contributor for the contribution.

If any of the contributor information is received after the contribution has been disclosed on a regularly scheduled report, the political committee shall either file with its next regularly scheduled report, an amended memo Schedule A listing all contributions for which contributor identifications have been received during the reporting period together with the dates and amounts of the contribution(s) and an indication of the previous report(s) to which the memo Schedule A relates; or file on or before its next regularly scheduled reporting date, amendments to the report(s) originally disclosing the contributions(s), which include the contributor identifications together with the dates and amounts of the contribution(s).

The Audit staff reviewed the Committee's contributions on a sample basis and noted a material error rate with respect to the disclosure of contributors' occupations and names of employer. The identified exceptions, when used to estimate the total dollar value of the errors in the population of \$4,175,127, resulted in a projected error amount of \$2,422,604. As part of the contribution sample review, the Audit staff requested a copy of the Committee's procedures to evidence its best efforts to obtain and report the missing information. Also, a similar request was made at the conference subsequent to the close of fieldwork. Although the Committee's fundraising guidelines indicated that solicitation devices should request the contributor's occupation and name of employer, our testing indicated that the Committee did not exercise best efforts to obtain and report the required information. Requests for additional information to qualify contributions for matching funds included a general request for the information, but evidence of attempts to obtain the information for other contributions was not provided. A review of the Committee's disclosure reports indicated that the Committee did not file amended schedules to disclose the contributor information when it was obtained. Therefore, the Committee has not demonstrated that it exercised best efforts to obtain, maintain and report the occupation and name of employer of contributors when required by the Act.

In the Memorandum, the Audit staff recommended that the Committee provide evidence to demonstrate that it exercised best efforts to obtain, maintain and report the required contributor information. Absent such a demonstration, the Audit staff recommended that the Committee contact all contributors for which no record was maintained or information request made and provide evidence of the contacts along with copies of responses to these requests, and file an Amended Schedule A-P (Itemized Contributions) as necessary.

According to the response, JVL Company contacted 2,699 donors by telephone whose aggregate annual contribution(s) was in excess of \$200 and whose file did not contain the required information. Occupation and name of employer information was obtained from 2,176 individuals (81%)⁸; for the remaining 523 contributors initially contacted who refused to provide the information, JVL sent each contributor a form and

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A list of the respondents was submitted which provided the contributor's name, address, occupation and name of employer.

requested that he/she sign a statement declining the Committee's request for occupation and name of employer. Using the receipts database supplied by the Committee, the Audit staff identified 3,699 individuals⁹ whose contributor record did not contain an occupation and name of employer. The reason for the variance with the number of individuals identified above by the Committee is unknown. On August 20, 1998 the Committee filed a miscellaneous document to supplement the public record.¹⁰

Based on our review of the submitted evidence, although the Committee's recent efforts to obtain the required occupation and name of employer information involved a significant undertaking, the Committee did not demonstrate that it exercised best efforts, since the information was requested well beyond the time specified. Nonetheless, the Committee should file amended Schedules A-P in the proper form to supplement the public record.

⁹ The Audit staff reviewed the contributor records of those individuals whose contributions aggregated over \$200 during calendar year 1995 and/or calendar year 1996.

¹⁰ Although not filed timely with the response to the Memorandum, the Committee did file a listing of approximately 15,505 contributors which included occupation and name of employer information. This listing did not conform with the requirements for amendments at 11 CFR §104.7(b)(4)(i).

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